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RECENT DEVELOPMENT IN NEW YORK LAW

HOLDING THAT AN INSURANCE COMPANY HAD NO DUTY TO DISCLOSE A LIFE- THREATENING MEDICAL CONDITION HIGHLIGHTS THE NEED FOR A NEW APPROACH

RONALD PALMESE JR.[†]

INTRODUCTION

Imagine that your spouse has recently suffered a fatal heart attack. While most heart diseases can be treated if detected early, certain heart diseases, if not attended to, can result in a life-ending myocardial infarction or a heart attack. Furthermore, suppose that your spouse's prospective life insurance company learned two months earlier, when it received the results of a physical examination, that he/she had severe and extensive atherosclerotic disease. The insurance company never informed you or your spouse of the test results because it did not believe it was required to do so under current law.

For many Americans, an insurance company's failure to disclose potentially life-saving information is not a hypothetical situation; rather, it is a devastating reality that has destroyed countless families. Take the recent case of *Petrosky v. Brasner*,¹ in which the First Department in New York ruled that an insurance company had no obligation to disclose to a prospective applicant that his coverage was being denied because he had

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¹ 718 N.Y.S.2d 340 (1st Dep't 2001).

heart abnormalities.² The court reasoned that nothing in the nature of Petrosky's relationship with the defendants could give rise to reasonable reliance on it for health information.³ Consequently, Mrs. Petrosky was left with a dead husband and no life insurance coverage in effect for her husband's death.

The outcome in *Petrosky* is troubling. It is the position of this Recent Development that such a duty to disclose a life-threatening medical condition should extend to insurance companies and prospective insureds. A duty should be imposed not only because the silence of an insurance company leads to reliance by a prospective insured but also because the social utility of disclosure outweighs the burden to the insurance company. Part I of this Recent Development provides information regarding when a duty to disclose is generally imposed and presents the facts and holding of *Petrosky*. It further explains the court's rationale for ruling that the insurance company had no affirmative duty. Part II discusses a case in the First Department, *McKinney v. Bellevue Hospital*,⁴ involving an employer and an employee, where the court ruled that a common law duty to disclose did exist between an employer and an employee/prospective employee. Part II then analogizes the situation in *McKinney* to *Petrosky* and asserts that the *Petrosky* court should have similarly imposed a duty to disclose on the defendants to reveal to Mr. Petrosky the results of his physical examination. Part III analyzes New York Insurance Law section 2611(c), explores the legislature's intention in creating this statute, and argues that its enactment should not foreclose the courts from finding an independent duty to disclose. Part IV presents legal arguments for imposing a duty to disclose on insurance companies, and Part V points to the policy arguments for doing so. Part VI discusses why the creation of a duty to disclose is an appropriate judicial function. This Recent Development concludes by determining that the decision in *Petrosky* effectively denied Mr. Petrosky his legal right to be informed of a life-threatening medical condition.

² *Id.* at 343.

³ *Id.*

⁴ 584 N.Y.S.2d 538 (1st Dep't 1992).

I. *PETROSKY V. BRASNER*: FAILING TO IMPOSE A DUTY TO DISCLOSE A LIFE-THREATENING MEDICAL CONDITION

It is well settled that a duty of reasonable care owed by a defendant to a plaintiff is elemental to any recovery in negligence.⁵ The law does not generally impose a duty to disclose, absent a fiduciary or confidential relationship,⁶ requiring instead some affirmative misrepresentation before imposing liability.⁷ Nonetheless, a failure to disclose the existence of a known danger may be the equivalent of misrepresentation where it is expected that another person will rely upon the appearance of safety.⁸ Recently, however, the First Department in *Petrosky v. Brasner* ignored this rule, holding instead that liability would not be imposed upon the defendants for failing to disclose decedent's heart disease because they neither affirmatively mislead the prospective insured nor foreseeably induced him to forgo otherwise necessary treatment.⁹

On February 3, 1997, decedent Frank Petrosky ("Mr. Petrosky") filed an application for life insurance with defendant insurance agent Steven Brasner ("Mr. Brasner"), employed by defendant Fabricant and Fabricant, a general agent of the United States Life Insurance Company ("U.S. Life").¹⁰ On February 11, 1997, defendant technician Brett Jensen ("Mr. Jensen"), from defendant Examination Management Services, Inc. ("EMSI"), performed pre-issuance medical tests on Mr. Petrosky, including an electrocardiogram ("EKG"), at the direction of U.S. Life.¹¹ The results of the EKG were then sent to

⁵ See, e.g., *Pulka v. Edelman*, 358 N.E.2d 1019, 1020 (N.Y. 1976); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

⁶ See *Mobil Oil Corp. v. Joshi*, 609 N.Y.S.2d 214, 215 (1st Dep't 1994) (finding no liability because the plaintiff failed to demonstrate either a fiduciary or a confidential relationship).

⁷ See *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 675 (1st Dep't 1991) (holding that "some affirmative misrepresentation or partial disclosure is required to impose upon the seller [of real estate] a duty to communicate undisclosed conditions affecting the premises").

⁸ See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 33, at 205-06 (5th ed. 1984).

⁹ *Petrosky v. Brasner*, 718 N.Y.S.2d 340, 343 (1st Dep't 2001).

¹⁰ R. Appeal at 80-81, *Petrosky v. Brasner*, 718 N.Y.S.2d 340 (1st Dep't 2001) (No. 98-105000) (Application for Policy). Mr. Brasner worked for Fabricant and Fabricant, a general agent of U.S. Life, who completed and filed an application for life insurance on the life of Mr. Petrosky. *Id.* at 81.

¹¹ *Id.* at 83; Record at 299-302 (Affidavit of Robert Bishop, Medical Director of EMSI) [hereinafter Bishop Aff.]. Jensen also drew blood and urine from Mr.

U.S. Life for analysis.¹² The laboratory tests showed that Mr. Petrosky had abnormalities of the heart, and U.S. Life therefore refused to issue the policy for the specific terms in the insurance application.¹³ This position, however, was never communicated to Mr. Petrosky before he suffered a heart attack and died on April 11, 1997.¹⁴ Autopsies revealed severe and extensive atherosclerotic disease.¹⁵

Plaintiff, Mrs. Barbara Petrosky ("Mrs. Petrosky"), was thereafter advised that there was no U.S. Life insurance coverage in effect for her husband's death.¹⁶ Mrs. Petrosky filed suit against Mr. Brasner, Fabricant and Fabricant, U.S. Life, Mr. Jensen, and EMSI, and each moved for summary judgment. The action alleged that the defendants were negligent in failing to disclose to decedent the results of his physical examination, namely the EKG results which revealed heart abnormalities. All of the defendants argued that they had no duty to obtain or

Petrosky and took a reading of his blood pressure. Bishop Aff. at 301.

¹² Bishop Aff. at 301.

¹³ Record at 242-43 (Affidavit of Steven Zimmer, Mrs. Petrosky's former attorney). U.S. Life decided to offer Mr. Petrosky an alternative "tobacco users" policy at a lower face value and shorter term, which alternative was communicated to insurance agent Mr. Brasner. Record at 84 (Amendment to Application).

¹⁴ Record at 232-39 (Affidavit of Tom Pratt, General Manager and Treasurer of Scatt Materials; Affidavit of Jay Boyle, Secretary of Mount Hope Asphalt Company; Affidavit of Barbara Koferi). Prior to his death, Mr. Petrosky worked at both Scatt Materials and Mount Hope Asphalt Company. *Id.* There were phone messages exchanged between Mr. Petrosky and Brasner, but Mr. Petrosky received no communication with reference to his application and no information about the results of the physical examination. *Id.* at 238-39.

¹⁵ Record at 245 (Affidavit of Dr. Martin Hoffman, specialist in the field of cardiology). Dr. Hoffman reviewed both the autopsy report relating to the death of Mr. Petrosky as well as the certified medical records of Brookhaven Memorial Medical Center relating to his treatment there on the date of his death. *Id.* Hoffman was of the opinion, with a reasonable degree of medical certainty, that the EKG might have been sufficient to enable a qualified physician to diagnose either the coronary artery blockage or the heart condition from which Mr. Petrosky was suffering at the time the EKG was performed. *Id.* It was also his opinion that the condition that caused Mr. Petrosky's death could have been treated if diagnosed prior to April 12, 1997. *Id.* Both the IAS court and the First Department had to accept Dr. Hoffman's opinion as true on the defendants' summary judgment motions.

¹⁶ *See* Record at 240 (Affidavit of Karen Miller, Legal Secretary employed by the Law Firm of Zimmer and Mazzei). Although there was no coverage in effect for Mr. Petrosky's death, Mr. Brasner had told Mrs. Miller that the policy was in order, and it would just be a matter of time before the claim was paid. *See id.* Mr. Brasner left Mrs. Miller with the distinct impression that the policy existed and the claim would be processed. *See id.*

reveal the test results of the EKG. Additionally, Mr. Jensen, EMI, Mr. Brasner, and Fabricant contended that they never possessed any knowledge of the test results.

Whether there exists a legal duty on the part of a life insurer to disclose adverse medical information to an applicant to whom it rejects coverage was a matter of first impression in New York. The Supreme Court, New York County, granted the defendants' motion to dismiss Mrs. Petrosky's claim. The court granted U.S. Life's motion, reasoning that the defendant owed no duty to disclose data obtained from a physical examination it had performed on Mr. Petrosky pursuant to his application for insurance;¹⁷ the claim was dismissed against the remaining defendants because they never possessed the information regarding Mr. Petrosky's physical examination.¹⁸

The Appellate Division, First Department, affirmed the lower court decision, holding that liability should not be imposed upon the defendants because they neither affirmatively misled Mr. Petrosky nor foreseeably induced him to forgo otherwise necessary treatment.¹⁹ The court reasoned that Mr. Petrosky was not examined by a physician and was specifically advised that the tests were not administered in the routine course of the application process and were not for the purposes of treatment. Additionally, the court found no indication that Mr. Petrosky relied on the defendants for anything other than approval for life insurance.²⁰ Furthermore, the broad duty of disclosure alleged did not arise by virtue of New York Insurance Law section 2611(c), which applies only to the discovery of HIV-related tests.²¹ Other lower courts have since agreed with the majority opinion in *Petrosky*.²²

¹⁷ *Petrosky v. Brasner*, 695 N.Y.S.2d 281, 286 (Sup. Ct. N.Y. County 1999), *aff'd*, 718 N.Y.S.2d 340 (1st Dep't 2001). The trial court noted that nothing in the process could have been interpreted by Mr. Petrosky as an inducement to forgo medical examination or attention, nor was there evidence that Mr. Petrosky had been induced to refrain from monitoring his health. *Id.*

¹⁸ *Id.* at 287.

¹⁹ *See Petrosky*, 718 N.Y.S.2d at 343.

²⁰ *Id.* ("Nothing in the nature of Petrosky's relationship with [defendants] could give rise to a reasonable reliance on it for health information despite the apparent abnormal EKG, the precise nature of which is not revealed.")

²¹ *Id.* ("Had the Legislature intended to extend the duty to the within circumstances, it would have expressly done so.")

²² *See Nolan v. First Colony Life Ins. Co.*, 784 A.2d 81, 90 (N.J. Super. Ct. App. Div. 2001) (ruling that no duty existed under New Jersey law requiring insurance

Justice Saxe, dissenting, nonetheless argued that an insurance company has "a legal duty to notify the prospective insured of [test] results" which reveal a "potentially life-threatening medical condition."²³ He asserted that "such a duty could be satisfied with only a minimal effort, and does not impose an onerous burden on the insurance industry."²⁴ Moreover, Justice Saxe contended that the "imposition of the duty in such circumstances comports with established law."²⁵ The failure to disclose the existence of a known danger was the equivalent of misrepresentation where it was to be expected that Mr. Petrosky would rely upon the appearance of safety.²⁶ Lastly, he rejected defendant's suggestion that it must be inferred from New York Insurance Law section 2611(c) that the legislature intended no duty be imposed upon insurers to disclose test results of any kind other than HIV tests.²⁷

Justice Saxe restated the rule enunciated earlier by the First Department that a duty exists in a negligence action "when a prospective employer learns through a pre-employment physical of a job applicant's potentially life-threatening condition."²⁸ He saw no reason to arrive at a different conclusion where a prospective insured learns of a potentially life-threatening condition through a physical examination of a

companies to disclose all pre-insurance examination results or even blood results to potential insured parties). The *Nolan* court reasoned that the legislature, not the judiciary, could create such a duty upon insurance companies. *Id.* at 87.

²³ *Petrosky*, 718 N.Y.S.2d at 343 (Saxe, J., dissenting). Justice Saxe would have "modified] the order on appeal so as to deny the motion insofar as it sought summary judgment dismissing the complaint as against [U.S. Life]." *Id.* Regarding the other defendants, he agreed with the majority that they never possessed the information resulting from the analysis of the specimens and the EKG that Mrs. Petrosky alleged they were duty bound to disclose. *See id.*

²⁴ *Id.* (Saxe, J., dissenting)

²⁵ *Id.* (Saxe, J., dissenting) (citing *McKinney v. Bellevue Hosp.*, 584 N.Y.S.2d 538 (1st Dep't 1992)).

²⁶ *Id.* at 346 (Saxe, J., dissenting) ("[D]efendant was . . . in possession of information of critical importance to plaintiff. . . . [T]he critical factor is . . . that the applicant would naturally believe, in the absence of any notification of a serious problem, that the silence following the physical examination meant that no indication of a critical health problem had been discerned.")

²⁷ *Id.* at 347 (Saxe, J., dissenting) ("[I]n enacting that provision, the Legislature was merely focusing its attention on the ongoing effort toward preventing the spread of contagious, deadly illness, which effort requires large-scale, society-wide actions.")

²⁸ *Id.* at 344 (Saxe, J., dissenting).

prospective insured.²⁹ According to Justice Saxe, because the average person, “in circumstances like Mr. Petrosky’s, would tend to interpret the insurer’s silence as an indication that no serious medical conditions were apparent in the test results it received, the law should impose upon the insurer a duty to disclose such results.”³⁰

II. RECOGNIZING A DUTY TO DISCLOSE A LIFE-THREATENING MEDICAL CONDITION FOR EMPLOYERS AND EXTENDING THAT DUTY TO INSURANCE COMPANIES

A. *McKinney v. Bellevue Hospital*

New York law does not generally recognize a duty to disclose, insisting instead on some affirmative misrepresentation before imposing liability.³¹ Nonetheless, “a failure to disclose the existence of a known danger may be the equivalent of misrepresentation, where it is to be expected that another will rely upon the appearance of safety.”³² In *McKinney v. Bellevue Hospital*, the First Department held that the failure to inform a prospective employee that his pre-employment physical detected a serious medical condition was an act of negligence.³³ It is asserted here that the *Petrosky* court should have similarly found that defendants had a duty to disclose Mr. Petrosky’s heart disease. Mr. Petrosky was equally justified in expecting that the discovery of a life-threatening disease would be communicated to him.³⁴

²⁹ See *id.* (Saxe, J., dissenting).

³⁰ *Id.* at 347 (Saxe, J., dissenting).

³¹ See *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 675 (1st Dep’t 1991) (holding that “some affirmative misrepresentation or partial disclosure is [normally] required to impose upon the seller of real estate a duty to communicate undisclosed conditions affecting the premises”).

³² *McKinney v. Bellevue Hosp.*, 584 N.Y.S.2d 538, 540 (1st Dep’t 1992) (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 33, at 179 (4th ed. 1971)).

³³ *Id.* (“[T]he silence of the employer induced reliance by the plaintiff on his general good health and resulted in the failure to seek treatment, to his obvious detriment . . .”). The court further commented that “[t]he tendency of the average person, in similar circumstances, to interpret the employer’s silence as an indication of good health [was] so apparent, and the consequence of such reliance so potentially serious, that we conclude the law imposes a duty to disclose upon the employer.” *Id.* The First Department ultimately affirmed the lower court’s dismissal of the complaint because service of notice of the complaint was untimely. *Id.*

³⁴ Although *Petrosky* was advised that the tests were part of the application

In *McKinney*, plaintiff McKinney received a pre-employment physical examination, including a chest x-ray, as part of his application for a position at Bellevue Hospital.³⁵ The defendant, Dr. Melinda Staiger, reviewed the x-ray. Dr. Staiger's report stated that she saw an "irregular agrigate [sic] density in the left lung apex."³⁶ McKinney was hired by Bellevue Hospital without ever being informed of these results.³⁷ The *McKinney* court concluded that "the silence of the employer induced reliance by plaintiff on his general good health and resulted in the failure to seek treatment, to his obvious detriment."³⁸ Furthermore, "[t]he tendency of the average person, in similar circumstances, to interpret the employer's silence as an indication of good health [was] so apparent and the consequences of such reliance so potentially serious that [the court] conclude[d] that the law imposes a duty to disclose upon the employer."³⁹ Because the situation in *McKinney* parallels that in *Petrosky*, the *Petrosky* court should have extended that reasoning and ruled in favor of the now widowed Mrs. Petrosky.

B. Reliance

In deciding that prospective and actual employees are owed a duty of disclosure, the courts have focused on the issue of reliance.⁴⁰ For purposes of reliance, there is no difference between an employee examinee and an insurance applicant examinee.⁴¹ Both must submit to physical examinations and medical tests and, therefore, are understandably susceptible to

process and not for treatment, he knew that the medical examinations would be carefully evaluated in determining his insurability and in assessing the risk. R. Appeal at 96-97, *Petrosky v. Brasner*, 718 N.Y. S.2d 340 (1st Dep't 2001) (No. 98-105000).

³⁵ *McKinney*, 584 N.Y.S.2d at 538.

³⁶ *Id.* at 539. Her clinical impression is stated as: "Differential diagnosis between pyoinflammatory disease such as tuberculosis verses [sic] possible lung neoplasm." *Id.*

³⁷ *Id.* In June 1988, McKinney "was examined at Booth Memorial Hospital and informed that he had a tumor." *Id.* He returned to Bellevue Hospital and had additional x-rays, confirming the diagnosis. *Id.*

³⁸ *Id.* at 540.

³⁹ *Id.*

⁴⁰ See, e.g., *id.*

⁴¹ See Hannah E. Greenwald, Comment, *What You Don't Know Could Save Your Life: A Case For Federal Insurance Disclosure Legislation*, 102 DICK. L. REV. 131, 159 (1997).

reliance.⁴² Furthermore, at the time of the examination, neither the employees nor the insurance applicants have a contractual or fiduciary relationship with the employers or insurers, whom require the examination. Therefore, in order to prevent unwarranted assumptions of good health, insurance companies should have the same duty of disclosure as employers.

C. *Similarities Between Insurance Companies and Employers*

There is no justification for ignoring the reasoning of the *McKinney* court in the circumstances surrounding Mr. Petrosky and defendant insurers.⁴³ Even if a special relationship can be said to exist between an employer and employee, the *McKinney* court applied its reasoning to prospective employees as well, and no special relationship can be said to exist between a prospective employer and a mere job applicant.

Because there are no apparent differences between cases involving employers and insurers, insurance companies ought to be held to the same standard as employers. Employers who require their prospective and actual employees to submit to medical examinations are also acting in their own self-interest, similar to insurance companies.⁴⁴ Therefore, the contention that an employer's duty to disclose is justified because an employer

⁴² See *Betesh v. United States*, 400 F. Supp. 238, 246 (D.D.C. 1974) ("When . . . a physical examination [is performed], the examinee generally assumes that 'no news is good news' and relies on the assumption that any serious condition will be revealed."); see also *Meinze v. Holmes*, 532 N.E.2d 170, 173-74 (Ohio Ct. App. 1987) (establishing that the employer's duty to notify the job applicant of test results is not dependent upon the existence of a physician-patient relationship between the job applicant and the physician interpreting test results). The *Meinze* court asserted that "[t]he duty to disclose will arise under circumstances when a reasonable physician . . . would disclose a significant risk or danger to the person being examined." *Id.*

⁴³ See *Petrosky v. Brasner*, 718 N.Y.S.2d 340, 346 (1st Dep't 2001) (Saxe, J., dissenting) ("No valid distinction can be made between a prospective employer and a prospective insurer who know of test results indicating the presence of a potentially life-threatening medical condition in an application, whether it be for a job or for an insurance policy.")

⁴⁴ Greenwald, *supra* note 41, at 159-60:

They are using the exam results to assess an individual's ability and suitability for employment, much in the same way insurance companies test to determine the insurability of an applicant. Just as insurance companies may use the results of their examinations to deny coverage, employers may use the test results to "exclude people from jobs."

Id.; see Lori B. Andrews & Ami S. Jaeger, *Confidentiality of Genetic Information in the Workplace*, 17 AM. J.L. & MED. 75, 87 (1991), cited in Greenwald, *supra*, at 160.

performs the test for the benefit of both the employer and the employee is unavailing. Also, insurers and employers use many of the same medical tests to make their decisions.⁴⁵ Lastly, employees, prospective employees, and insurance applicants alike have no control over the process.⁴⁶

D. Applicability to Physicians and Non-Physicians Alike

It should make no difference that the professional who interpreted Mr. Petrosky's test results was a medical professional other than a physician. This view departs from the rule announced in *Doe v. Jackson National Life Insurance Co.*⁴⁷ The *Doe* court opined that when a physician has conducted an exam, provided medical judgments, or assumed an advisory role, the employee examinee has a "right to expect a certain degree of care and disclosure on their health and health related matters regardless of whether a doctor/patient relationship exists."⁴⁸

The court was unwilling to conclude that an insurance company should bear the same burden as a physician,⁴⁹ finding instead that "[t]o hold insurance companies to the same standard as physicians would be to expect expertise on health related matters from an entity which hasn't [sic] the knowledge or the resources."⁵⁰ A rule limiting the duty to circumstances when a physician conducted the test or interpreted the test results would permit an insurance company to avoid liability simply by employing non-physician technicians to evaluate and interpret

⁴⁵ Greenwald, *supra* note 41, at 160 ("Employers require their employees to submit to x-rays, urine samples, blood tests, and HIV tests.").

⁴⁶ See Frances H. Miller, *Biological Monitoring: The Employer's Dilemma*, 9 AM. J.L. & MED. 387, 413 (1984) ("Job applicants may not relish being screened for health problems, but in most circumstances they are powerless to refuse if they want to be hired."); Greenwald, *supra* note 41, at 160 ("In order to have the opportunity to secure a job, to keep a job, or to procure insurance, they have to acquiesce to the demands of the employers and insurers.").

⁴⁷ 944 F. Supp. 488, 494 (S.D. Miss. 1995) (applying Mississippi law), *aff'd sub nom.* *Derasmus v. Jackson Nat'l Life Ins. Co.*, 92 F.3d 274 (5th Cir. 1996) (per curiam).

⁴⁸ *Id.*

⁴⁹ To justify this conclusion, the court distinguished between a physician and an insurance company by ruling that the former "is sworn to protect and respect human life" while the latter, "by insuring those individuals it perceives as 'insurable,' is here to soften the blow of natural and artificial disasters, be it death, fire or flood." *Id.* at 495.

⁵⁰ *Id.*

the results of medical tests.⁵¹ The rule announced by the *Doe* court is wrong because it ignores the fact that prospective applicants rely on these test results as an indicator of their health. Without a duty to disclose, insurance companies will continue to induce unsuspecting individuals into believing that they are healthy, even though they may actually have a life-threatening medical condition.

Language from the Ohio Court of Appeals in *Meinze v. Holmes*, however, suggests that a duty to disclose could arise either "because the physician has examined the insured personally or has reviewed his confidential medical records."⁵² Ultimately, despite attempts to justify disparate treatment of employers and insurers because of the use of physicians, such reasoning fails because insurance companies use physicians as well.⁵³ In *Petrosky*, for example, Mr. Petrosky's test results were also analyzed by a trained physician, the medical director at U.S. Life.⁵⁴ Therefore, the court should have similarly imposed a duty upon the defendant insurance company.

III. NEW YORK INSURANCE LAW § 2611(C)

Despite the enactment of New York Insurance Law section 2611(c), it should not be inferred that the legislature intended that no duty be imposed upon insurers to disclose test results of

⁵¹ See *Petrosky v. Brasner*, 718 N.Y.S.2d 340, 346 (1st Dep't 2001) ("If an insurer in possession of troubling test results may be said to have a duty to disclose those test results if they were obtained by a physician, there should be no different result where some other form of medical professional or technician obtained them.").

⁵² *Meinze v. Holmes*, 532 N.E.2d 170, 174 (Ohio Ct. App. 1987) ("Th[e] duty arises because the physician has examined the insured personally or has reviewed his confidential medical records, and he has thus assumed a professional and expert position with respect to the insured's physical condition and well-being, even though a doctor-patient relationship has not been created."). The *Petrosky* court erred in following the rule in *Doe v. Prudential Insurance Company of America*, 860 F. Supp. 243, 251-52 (D. Md. 1993), that a physician must "personally" perform the tests before a duty to disclose will exist. See *Petrosky*, 718 N.Y.S.2d at 343. The *Prudential* ruling would never find a duty to disclose life threatening test results, even where the insurance company has trained physicians and medical directors analyzing the results of the tests, but the physicians do not actually perform the tests. See *Prudential Ins. Co. of Am.*, 860 F. Supp. at 252.

⁵³ See JOSEPH MACLEAN, LIFE INSURANCE 250-56 (1962). Every life insurance company has a medical director who is a licensed physician and whose duties include reviewing the report of every examination conducted on their applicants. *Id.*

⁵⁴ See Record at 301, *Petrosky*, 718 N.Y.S.2d 340 (No. 98-105000) (Bishop Aff., ¶10) (indicating that Petrosky's confidential records were reviewed by a trained physician, but the tests were taken by a non-physician).

any kind other than HIV tests.⁵⁵ Section 2611(c) is one of several legislative measures taken throughout the country to curtail the harm that results from non-disclosure.⁵⁶ Currently, twenty-nine states require insurance company disclosure for those infected with HIV.⁵⁷ There have even been attempts to pass a federal insurance disclosure law that would require disclosure of all results of application medical tests.⁵⁸

A. *The Legislative History of New York Insurance Law Section 2611(c)*

The Legislative History suggests that New York Insurance Law section 2611(c) was designed merely to clarify the issue of when, and to whom, HIV-related information may be disclosed.⁵⁹ Attempting to control the spread of AIDS, the legislature enacted the statute in order to provide confidentiality protections to infected persons.⁶⁰ Because the transmission rate of the AIDS

⁵⁵ Section 2611(c) provides:

In the event that an insurer's adverse underwriting decision is based in whole or in part on the result of an HIV related test, the insurer shall notify the individual of the adverse underwriting decision and ask the individual to elect in writing, unless the individual has already done so, whether to have the specific HIV related test results disclosed directly to the individual or to such other person as the individual may designate.

N.Y. INS. LAW § 2611(c) (Consol. 2001).

⁵⁶ See Greenwald, *supra* note 41, at 148–49 (commenting that two of the main harms arising from a policy of non-disclosure by insurance companies are the loss of treatment time and the health risk to others).

⁵⁷ *Id.* at 132–33; see, e.g., CAL. INS. CODE § 799.03 (Deering 1992); FLA. STAT. ANN. § 627.429 (West 1996).

⁵⁸ See Greenwald, *supra* note 41, at 138 (“The [Medical Privacy in the Age of New Technologies] Act imposes an absolute duty on insurance companies to disclose to applicants the results of their medical examinations. It provides that individuals must have ‘access to health information of which they are subject.’”). Congress, however, has not passed the Act.

⁵⁹ See Mem. of Sen. John R. Dunne, S. 211-584, Reg. Sess. (N.Y. 1988), reprinted in N.Y. STATE LEGISLATIVE ANNUAL 1988, at 234 (“The purpose of this bill is to require informed consent and pre-test and post-test counseling for HIV-related testing and to provide confidentiality protections for HIV-related information.”).

⁶⁰ Senator Dunne commented:

In its final report, the President's Commission on the HIV Epidemic noted that confidentiality protections are the cornerstone of any public health strategy to control the spread of AIDS, because all available strategies rely on the voluntary cooperation of those at risk. Fear of breaches of confidentiality may discourage those at risk from using available health and social services to learn their HIV status and be counseled on how to prevent future infection or transmission of the virus.

Id.

virus had reached epidemic proportions,⁶¹ the statute was created with the intention of encouraging those infected to seek medical assistance, not to limit the duty of disclosure to those infected with HIV.⁶²

In enacting the provision, the legislature focused its attention on preventing the spread of a contagious and deadly illness, the accomplishment of which requires society-wide action.⁶³ Yet, although New York Insurance Law section 2611(c) only applies to HIV, it should not be inferred that the legislature intended for a duty to be imposed on insurance companies solely in this context. In order to encourage those infected with HIV to seek treatment, it was imperative that this statute be enacted. Its enactment, however, should not preclude courts from defining a judicially imposed duty of disclosure on insurance companies.

B. Representing a Vocal Minority

It seems incongruous that Insurance Law section 2611(c) should clearly protect a vocal minority in this country, namely those infected with AIDS, while overlooking the silent majority of individuals suffering from some form of heart disease. More than 700,000 cases of AIDS have been reported in the United States since 1981, and as many as 900,000 Americans may be infected with HIV, a figure that includes those who already have AIDS.⁶⁴ Nonetheless, those suffering from AIDS represent a minority of Americans who suffer from life-threatening diseases.

In contrast, cardiovascular disease is the number one killer in the United States,⁶⁵ with more than sixty-one million Americans having some form of cardiovascular disease.⁶⁶ Every

⁶¹ See Greenwald, *supra* note 41, at 149.

⁶² See Mem. of Sen. John R. Dunne, S. 211-584, Reg. Sess. (N.Y. 1988), reprinted in N.Y. STATE LEGISLATIVE ANNUAL 1988, at 235 ("This bill reinforces and expands the confidential relationship between individuals at risk of HIV infection and providers of health or social services who are likely to obtain such information in the course of their work.").

⁶³ See *Petrosky v. Brasner*, 718 N.Y.S.2d 340, 347 (1st Dep't 2001) (Saxe, J., dissenting).

⁶⁴ See David Brown, *4 of 10 People With HIV Get Late Diagnosis; For Many, Awareness Comes After Infection Has Done Much Damage or Advanced Into AIDS*, WASH. POST, Aug. 15, 2001, at A3.

⁶⁵ See Jonathan Fielding & Valerie Ulene, *Life After Heart Attack Can Be Normal*, L.A. TIMES, Aug. 27, 2001, at 3.

⁶⁶ NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, ABOUT CARDIOVASCULAR DISEASE (2002), at <http://www.cdc.gov/cvh/>

year approximately 950,000 Americans die of cardiovascular disease, amounting to one death every thirty-three seconds.⁶⁷ Because many more Americans are at risk of developing heart disease in contrast to contracting AIDS, it would be wrong to conclude that, in enacting section 2611(c), the legislature intended to bar the imposition of a duty upon insurers to disclose test results other than HIV tests. It did not preclude the courts from imposing a similar duty in other types of circumstances.

IV. LEGAL ARGUMENT FOR IMPOSING A DUTY TO DISCLOSE A LIFE-THREATENING MEDICAL CONDITION ON INSURERS

There is a strong legal basis supporting the argument that insurers should have a judicially created duty to disclose. Judge Learned Hand's famous risk-utility formula strongly suggests that insurance companies should inform applicants of the results of their applications.⁶⁸ Because of the minor burden disclosure imposes and the significant probable risks to life presented by a policy of non-disclosure, insurance companies should have a legal duty of disclosure.⁶⁹ Moreover, the claim that an insurance company, unlike an employer, is not well equipped to diagnose a disease is mistaken.⁷⁰ To the contrary, insurance companies are

aboutcardio.htm.

⁶⁷ NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, PREVENTING HEART DISEASE AND STROKE: ADDRESSING THE NATION'S LEADING KILLERS (2002), at <http://www.cdc.gov/cvh/cvdaag.htm>.

⁶⁸ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (to determine the extent of the defendant's duty in a negligence case, three factors should be considered: 1) the probability that the accident will occur if no precautions are taken; 2) the magnitude of the injury if the accident occurs; and 3) the burden of taking adequate precautions that would prevent the accident). Judge Hand stated the formula thus, "[I]f the probability be called, P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is less than] PL." *Id.*

⁶⁹ See Greenwald, *supra* note 41, at 150.

The magnitude of the injury if the insurance company does not disclose the life-threatening information (L) is the exacerbation of the illness because of the loss of treatment time or death of the ill applicant as well as the possible infection of third parties. . . . The likelihood that such injuries will occur if the insurance company does not disclose the life threatening information (P) is also very high as an individual who does not know she is sick will do nothing to help herself. Lastly, the burden (B) on the insurance company of informing the applicant of her illness is, in comparison, insignificant.

Id. at 152.

⁷⁰ See *Green v. Walker*, 910 F.2d 291, 295 (5th Cir. 1990) (noting that both

equipped to release to a prospective insurance applicant not only his or her medical diagnosis but also the full test results.

A. *Harm Resulting from an Insurer's Failure to Disclose*

Nondisclosure endangers not only the insurance applicant but also dozens of third parties with whom the applicant interacts. The most basic harm resulting from an insurance company's failure to inform an individual that they are suffering from a critical medical condition is the loss of treatment time.⁷¹ Courts have required employers to notify employees of examination results,⁷² and such a disclosure requirement should exist in the insurance context as well.⁷³ Had Mr. Petrosky, for example, been notified by U.S. Life that he had a serious heart condition, he might have averted his premature death.⁷⁴ Accordingly, the rule requiring disclosure of life-threatening illnesses in employment cases should apply equally to pre-insurance physicals.⁷⁵

In addition to loss of treatment time, the failure to disclose an applicant's medical condition can result in serious health risks to third parties if the undisclosed condition is communicable. Nonetheless, the *Deramus* court recently faced

insurers and employers ask applicants to submit to x-rays, urine samples, blood tests, and HIV tests); see also R. Appeal at 305, *Petrosky v. Brasner*, 718 N.Y.S.2d 340 (1st Dep't 2001) (No. 98-105000) (Affidavit of Brett Jensen) (acknowledging that insurance companies hire and employ physicians to review results of the examinations).

⁷¹ See ERROL C. FRIEDBERG, *CANCER ANSWERS: ENCOURAGING ANSWERS TO 25 QUESTIONS YOU WERE ALWAYS AFRAID TO ASK* 148 (1992) (asserting that early diagnosis and early treatment are significant factors in improving the chance of curability in cancer patients as well as those with heart disease).

⁷² See generally *James v. United States*, 483 F. Supp. 581 (N.D. Cal. 1980) (imposing a duty on the employers where employees were not aware of their condition and thereby lost valuable treatment time).

⁷³ See Greenwald, *supra* note 41, at 149 ("[R]egardless of this implied notice and actual knowledge, the fact still remains that under the current nondisclosure system, insurance companies can exclusively control information that might save or prolong lives.").

⁷⁴ See R. Appeal at 245, *Petrosky* (No. 98-105000) (Affidavit of Dr. Martin Hoffman). There was a high degree of medical certainty that the EKG could have indicated a serious heart condition. *Id.* Dr. Hoffman, an expert witness on behalf of Mr. Petrosky, further stated, with a reasonable degree of medical certainty, that the conditions that caused Mr. Petrosky's death might have been treated if they had been diagnosed earlier. *Id.*

⁷⁵ See *McKinney v. Bellevue Hosp.*, 584 N.Y.S.2d 538, 540 (1st Dep't 1992) (imposing disclosure requirements for pre-employment physical).

such a situation but declined to find a duty to disclose.⁷⁶ The argument can be made that the prevention of serious health risks is the responsibility of the individuals involved and not of the insurance companies. Yet, when an insurance company has information that could potentially save numerous lives, disclosure of such information should be required.

B. Burden on the Insurance Company from Disclosure

In comparison to the magnitude and likelihood of injury resulting from the insurance company's non-disclosure of a life-threatening medical condition, the burden on the insurance company of informing the applicant of her illness is insignificant. The insurance company could simply add another paragraph to its response letters and attach a copy of the test results. The letter need only explain that the applicant might have a very serious illness and should see a physician immediately. Leaving it to the insurance companies to decide which test results should be released to the applicant's physician is insufficient.⁷⁷ Insurance companies should be legally obligated to disclose all information.

V. POLICY ARGUMENT FOR IMPOSING A DUTY TO DISCLOSE A LIFE-THREATENING MEDICAL CONDITION ON INSURERS

Courts have alluded to policy considerations in determining whether a duty exists. Such policy considerations include: the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered the injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and availability, cost, and prevalence of insurance for the risk involved.⁷⁸

⁷⁶ See *Deramus v. Jackson Nat'l Life Ins. Co.*, 92 F.3d 274, 275 (5th Cir. 1996) (determining that under Mississippi law, the insurance carrier had no duty to disclose, despite the fact that the plaintiff had a contagious disease, namely AIDS).

⁷⁷ See Chuck Jones, *I Know Something You Don't Know*, LIFE ASS'N NEWS, Nov. 1996, at 41.

⁷⁸ See, e.g., *Doe v. Prudential Ins. Co.*, 860 F. Supp. 243, 251 (D. Md. 1993) (quoting *Vill. of Cross Keys, Inc. v. United States Gypsum Co.*, 556 A.2d 1126 (Md.

Clearly, a duty to disclose should be placed on insurance companies. It is certainly foreseeable and likely that injury will result to an individual who has not received information from an insurance company that his policy was denied because he has a life-threatening medical condition. A person who does not know that he is sick will not procure treatment and in certain circumstances will not take necessary measures to avoid infecting others. Furthermore, by exempting insurance companies from disclosure requirements, it is likely that the individual's health will deteriorate. Mr. Petrosky was denied the opportunity to seek treatment from a cardiologist because he was unaware of his cardiovascular disease.

It was undisputed that Mr. Jensen advised Mr. Petrosky that the tests were not for the purpose of treatment or evaluation by Mr. Jensen; however, this fact should not be determinative of Mrs. Petrosky's claim. Insurance contracts have been referred to as "contracts of adhesion" in view of the disadvantageous bargaining position which generally exists between the parties and, under such circumstances, are normally construed against the insurer.⁷⁹ Although the New York Court of Appeals has held that a "contract for insurance is no different than any other contract,"⁸⁰ it has recognized "[t]he tendency on the part of the courts to treat insurance contracts as standing in a class by themselves."⁸¹

Clearly, Mr. Petrosky was in a disparate position with U.S. Life and the other defendants with regard to negotiating the terms of the policy. While Mr. Petrosky was aware that the tests were not intended for evaluation, he, like most Americans, surely believed that U.S. Life would, at the very least, disclose any life-threatening medical conditions that were detected during the examination. Mr. Petrosky would never have imagined that his abnormal EKG results would be withheld from him. As a result, Mr. Petrosky was unable to seek necessary medical treatment. It would be inexcusable for the defendants to escape liability because Mr. Petrosky relied, to his detriment, on their silence.

1989)).

⁷⁹ See generally 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 626 (Walter H. E. Jaeger ed., 3d ed. 1961).

⁸⁰ *Drilling v. N.Y. Life Ins. Co.*, 137 N.E. 314, 316 (N.Y. 1922).

⁸¹ *Satz v. Mass. Bonding & Ins. Co.*, 153 N.E. 844, 846 (N.Y. 1926).

Because an insurer might be the only one with both the knowledge of the health condition and the ability to prevent further harm, there is a causal link between the non-disclosure by insurance companies and the potential for an applicant's health to deteriorate as a result of this policy. Additionally, from a practical standpoint, the companies should disclose this information simply because they possess it. Furthermore, since *McKinney*, New York has imposed a duty to disclose on employers; there is no reason not to extend this duty to insurance companies. Thus, the combination of risk-utility and policy considerations dictates that New York law should impose a legal duty of disclosure on insurance companies in order to diminish the instances of health deterioration that stem from a policy of non-disclosure.

VI. CREATING A DUTY TO DISCLOSE

The *Petrosky* court did not impose a duty to disclose life-threatening medical conditions to a prospective insured because of the absence of a statutory mandate. The court reasoned that it was neither the function nor the mission of the court to assume the role of the legislature in creating such an obligation.⁸² Part of the task of a court operating within the common-law tradition, however, is to determine the propriety of imposing a duty upon a party in a particular situation.

In *McKinney*, for example, the First Department imposed a common-law duty on employers and prospective employers to disclose life-threatening medical conditions.⁸³ A duty was found there primarily because the employer's silence gave the employee a misdirected sense of good health; the consequences of the reliance were so serious; the burden upon the employer was so slight; and in contrast, the benefits of disclosure to the public were so great.

While it is traditionally the function of the legislature to make policy, it is also the function of the court to either create duties or expand legislation as the court deems necessary.⁸⁴ Like

⁸² *Petrosky v. Brasner*, 718 N.Y.S.2d 340, 343 (1st Dep't 2001).

⁸³ *McKinney v. Bellevue Hosp.*, 584 N.Y.S.2d 538, 540 (1st Dep't 1992) (holding that the silence of the employer, which induced reliance by plaintiff, acted as an affirmative misrepresentation, thereby imposing liability).

⁸⁴ See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (applying a risk-utility analysis in determining whether or not to impose a duty on

legislation, the common law has historically developed and grown in response to changes in society. The court would not be acting like a super-legislature by imposing a duty on insurance companies to disclose life-threatening medical conditions because it has already imposed this duty on employers. Rather, it would simply be continuing the common law tradition of speaking on a subject on which the legislature has not spoken.⁸⁵ Thus, the *Petrosky* court would have been acting properly in expanding the duty to disclose to insurance companies.

CONCLUSION

In concluding that defendant insurance company owed no duty to Mr. Petrosky, the court in *Petrosky* has denied the deceased and others in New York their right to be notified of a potentially life-threatening disease. The reasoning enunciated in *McKinney* is no less applicable in the present case. Because the average person, in circumstances like Mr. Petrosky's, would tend to interpret the insurer's silence as an indication that no serious medical conditions were apparent in his test results, the law should impose upon an insurer a duty to disclose such results.

barge carriers).

⁸⁵ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 124 (1921) ("[T]he power to declare the law carries with it the power, and within limits the duty, to make law when none exists . . .").

